MOTION PICTURE CENSORSHIP: SOCIAL CONTROL AND THE CONSTITUTION

GENERAL AND HISTORICAL BACKGROUND

From antiquity attempted censorship of expression has evoked much criticism and even some rebellion. Man, as an individual, would be free, if he could, to do—and say—what pleases him. It is axiomatic that man as a social animal cannot do, without limit, what pleases him individually. No more may he exercise limitless license in the expression of his ideas. It is the purpose of this article to explore one small facet of man's attempt to socially circumscribe man's freedom of expression.

Although the phenomenon of censorship antedates both the advent of motion picturs and our federal Constitution itself, time has not calmed the ferocity with which any such system is both acclaimed and damned. Modern writers proclaim the "fight between the literati and the philistines" in much the same manner as John Milton launched an attack with his *Appeal for the Liberty of Unlicensed Printing.* Of all forms of censorship that attempting control over motion pictures is the most recent. It was not until 1913 that such a system was introduced in this country, although there had been earlier agitation for it. Interestingly enough, Ohio was the first state to take the plunge.[1] From that date, this state's film censorship law has been a focal point around which much of the legal battle has raged.[2]

The Ohio law as enacted in 1913 provided for a board of censors, under the Industrial Commission, whose function it was to view and certify all motion pictures prior to their exhibition in the state. No film could be shown commercially without the approval of that body. The law provided for fees to be paid by those seeking approval of any picture, as well as for administrative hearings, and judicial review by the Ohio Supreme Court. After surviving an early attack on its constitutionality —a matter to be discussed at length later—the law was amended in 1921 to transfer censorship duties from the Industrial Commission to the Department of Education.

Shortly thereafter criminal sanctions were inaugurated. Newsreels were exempted from operation of the law in 1933 and in the same year there was a recodification of the act. Exercising its sovereign prerogative in 1935, the legislature changed its mind and once more subjected newsreels to the overview of the censor. From that date to this nothing of substance has been added or deleted from the law, although there was a recodification in 1943. The standard which the censor was admonished to follow under the early 1913 law coincides exactly with the specified

[1] 103 Ohio Laws 399.

[2] Throughout this article reference will be made to the Ohio motion picture censorship law, R.C. 3305.01 *et seq,* not because of any unique vices or virtues there exhibited but rather, for the reason that it is more or less typical of other state legislation.

standard under the existing statute. That is to say the 1913 censor, like his modern counterpart, was empowered to suppress any motion picture which was not "moral, educational or amusing and harmless in character."[3]

Contrary to what might be supposed from the attending furor, there is no great plethora of prior censorship laws on the books of state legislatures in this country today. Only a handful of states have any system of prior restraint—even these display a singular lack of ingenuity. Florida allows the suppression of any film not approved by the National Board of Review or the New York censor board.[4] Louisiana borrows Ohio standards verbatim,[5] while New York suppresses any movie found to be "obscene, indecent, immoral, inhuman, sacrilegious, or—of such a character that its exhibition would tend to corrupt morals or incite crime."[6] Virginia and Maryland have similar vague standards to implement their laws of prior restraint.[7]

Various other states impose sanctions for the exhibition of movies thought to contravene varying standards of decency, but have no prior restraint provisions.[8]

In summation, we find then, two basic formulae employed to suppress exhibition of undesired motion pictures; (1) comprehensive pre-exhibition censorship—which is usually coupled with criminal sanctions, and (2) censorship imposed indirectly by punishment after the fact of exhibition. The two systems are alike in that they employ equally vague, often meaningless, cliches as their frames of reference (examples are "immoral", "tending to debase", "lascivious", "lewd", "harmless", and so on.)

The chief objection to the foregoing standards, aside from the implicit constitutional objection, is that they are almost infinitely susceptible of misapplication. For as John Locke once observed:

Men take the words they find in use . . . and that they may not

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3. For an excellent discussion of the historical development of the Ohio law see Brychta, *The Ohio Film Censorship Law,* 13 OHIO ST. L. J. 350 (1952).

4 FLA. STAT. §§521.01 to 521.04 (1951).

5 LA. REV. STAT. tit. 4 §§301 to 307 (1950).

6 NEW YORK CONSOLIDATED LAWS §120(a) (McKinney 1953).

7 VA. CODE §§2-98 to 2-116 (1950).
MD. CODE ANN. ART 66A §6 (Flack 1951).

8 SEE PARTICULARLY:
CONN. GEN. STAT. §8580 AND §3702 (1949).
ILL. REV. STAT. c. 38 §471 (1935).
IOWA CODE ANN. §725.3 (1946).
MASS. LAWS ANN. c. 136 §§2 to 4 (1946).
MONT. REV. CODE ANN. §94-3573 (1947).
NEB. REV. STAT. §28-1120 (1943).
N. C. GEN. STAT. §14-193 (1950).
TEX. PEN. CODE ART. 527 (Vernon 1952).
VT. STAT. §351.38(3) (1951).

> seem ignorant of what they stand for, use them confidently without much troubling their heads about a certain fixed meaning, whereby besides the ease of it they obtain this advantage—that as in such discourse they are seldom in the right, so they are seldom to be convinced they are in the wrong.[9]

As might be expected, the various boards of censorship have seldom, in the past, been judicially reversed by state courts in their application of the aforementioned standards.

Movie Censorship and the Federal Constitution

From its inception pre-exhibition movie censorship has been the target of concerted assault. The central theme of the attack has been the allegation of unconstitutionality. *Mutual Films v. Industrial Commission of Ohio*[10] involved an Ohio statute which sanctioned the suppression of motion pictures not thought by state censors to be "moral, educational or of an amusing and harmless character." In that case the Supreme Court of the United States in effect held that since motion picture exhibition constituted "a business pure and simple" it did not fall within the ambit of speech protected by either the state or federal constitutions. Although this might seem a rather tenuous distinction, it must be said on the Court's behalf that at this historical juncture movies were generally conceded to be a rather novel innovation in somewhat the same category with circuses, side-shows, and belly-dancing.[11] Nor should it be forgotten that First Amendment rights under the Federal Constitution had not yet been incorporated into the Fourteenth so as to circumscribe state action. Even had the Court found in the *Mutual* case that movies were entitled to First Amendment protection it seems unlikely that the Ohio law would have been invalidated. Certainly the efficacy of the decision cannot be doubted since for more than thirty years it remained successfully unchallenged. It was 1948 before the Supreme Court expressed its dissatisfaction with the *Mutual* rationale.

But this is not to say that in the interim the Supreme Court was inactive in the area of First Amendment rights. On the contrary, doctrines which would later have determinative effect on movie censorship were being formulated. In *Gitlow v. New York*[12] the Court first assumed that freedom of speech under the First Amendment was included within the purview of the Fourteenth. This halting first step toward federal restriction of state action was affirmed and made explicit by *Stromberg v. California*.[13] There a defendant was convicted under a state statute which read:

> Any person who displays a red flag, banner or badge, or any

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[9] Ogden and Richards, The Meaning of Meaning, 137 (1952).

[10] 236 U.S. 230 (1915).

[11] See also Mutual Films v. Hodges, 236 U. S. 248 (1915).

[12] 268 U. S. 652 (1925).

[13] 283 U. S. 359 (1931).

> flag, badge, banner, or device of any color or form whatever in any public place or public assembly . . . as a sign, symbol, or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or aid to propaganda which is of a seditious character is guilty of felony.[14]

The Supreme Court struck down the statute declaring:

> A statute which upon its face, and as authoritatively construed is so *vague* and *indefinite* as to prohibit the fair use of this opportunity (free speech) is repugnant to the guaranty of liberty contained in the Fourteenth Amendment (Emphasis supplied).[15]

Along with the Supreme Court's expansion of the free speech concept at the expense of state police power came recognition that the Court viewed with askance the very fabric of all censorship. Decisions following *Stromberg* determined that even indirect censorship was, in certain instances, invalid. Struck down as dehors state police power was a discriminatory tax on newspapers[16] and a municipal ordinance requiring a license for handbill distribution.[17] The presumption had seemingly shifted from validity to invalidity; in this changed judicial atmosphere it was inevitable that the *Mutual* film censorship dogma would be resubmitted to scrutiny. The first perceptible inkling of a judicial deviation from that early decision came in *United States v. Paramount Pictures*[18] where the Court ventured this pregnant obiter:

> We have no doubt that moving pictures like newspapers and radio are included in the press whose freedom is guaranteed by the First Amendment.

The states were on notice. Shortly thereafter the highest court in the land acted explicitly and decisively in *Joseph Burstyn, Inc. v. New York*[19] where a New York censorship law required the suppression of motion pictures found to be "obscene, indecent, immoral, inhuman, sacrilegious or (such as) would tend to corrupt morals or incite crime." As in the *Stromberg* case, *supra*, a majority of the Justices thought the standard applied—"sacrilegious"—so vague as to deprive the petitioner of his constitutional rights under Amendments One and Fourteen. Mr. Justice Frankfurter, concurring, thought the vagueness vitiated procedural due process. Said he: "Thus the administrative first step becomes the last."[20]

Coming hard on the heels of the *Burstyn* opinion was *Superior Films v. Department of Education of Ohio*[21] which involved an interpretation of the Ohio censorship law. Striking down that statute—which interestingly enough was identical to that sustained by the *Mutual* opinion—employed

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14 CALIF. PENAL CODE, §403-a.

15 283 U. S. at 369-370.

16 Grossjean v. American Press Co., 297 U. S. 233 (1936).

17 Lovell v. City of Griffin, 303 U. S. 444, 450 (1937).

18 334 U. S. 131, 166 (1948).

19 343 U. S. 495 (1952).

20 *Id.* at 532.

21 346 U. S. 587 (1954).

what is known in writing circles as "economy of expression." The total majority opinion reads:

> Per curiam. The Judgments are reversed. *Joseph Burstyn v. New York*, 343 U. S. 495.

A minority of the Court, including Mr. Justice Douglas, conceived prior restraint of movies as *per se* illegal. Significantly the Justice thought it necessary to concur; apparently the majority disagreed with his view that prior censorship could never be valid. A companion case which involved an application of the standard "immoral" under a New York censor law was similarly disposed of in the same opinion.[22] In the only other movie censorship case to reach the Supreme Court to date, the Court struck down a municipal ordinance which provided for suppression of motion pictures which in the opinion of the board "are of such a character as to be prejudicial to the best interests of the city."[23]

One other more recent pronouncement of the Court is worthy of attention here. In *Holmby Productions, Inc. v. Vaughn*[24] a Kansas censor board was prohibited by the Court from enforcing a ban on a picture, scenes of which were found to be "obscene, indecent, and immoral and such as tend to debase or corrupt morals." The Kansas law applied was notably similar to the law in force in New York at the time of the *Burstyn* opinion. The Kansas board, however, went one step further into the limbo of unconstitutionality than did its New York counterpart in *Burstyn*. While the New York censors were willing to rest their attempted suppression on a single clearly delineated standard (i.e., "sacrilegious") their Kansas counterpart in *Holmby* employed a multiple standard shotgun approach. It is clear after *Commercial Pictures, supra*, that "immorality" is not a sufficiently concrete standard to meet constitutional requisites; it is equally clear since *Holmby* that where multiple standards are designated, some of which are patently invalid, and the Court cannot ascertain that only valid standards were relied upon, the censorship will be voided as unconstitutional. Since the Constitutional interdiction is aimed at vagueness of criteria it is at once apparent that the shotgun *Holmby* approach is more clearly unconstitutional than even the standards sought to be effected in *Burstyn, Gelling and Superior Films*. The *Holmby* decision should not be read, it is submitted, as declaring the standard "obscene", when standing alone and definitionally circumscribed, unconstitutional. There is grave danger in overgeneralizing from per curiam decisions especially in this area where the Court has traditionally left open, as we shall see, definite avenues for the exercise of state police powers.

In short summary we note that the Supreme Court of the United States has struck down, to date, the following standards employed in state

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[22] Commercial Pictures Corp. v. Board of Regents, 305 N. Y. 336, *reversed* 346 U.S. 587 (1954).

[23] Gelling v. Texas, 343 U. S. 690 (1952).

[24] 177 Kan. 728, 282 P. 2d 412, *reversed per curiam*, 350 U. S. 870 (1955).

motion picture censorship statutes: (1) sacrilegious (2) harmful (3) immoral (4) discretion of the censors as to best interest of the city. All four of the above standards are extremely vague and the first one is also suspect on the question of religious freedom.[25]

Apparently impressed by weight of number, plus perhaps an understandable concern over the now accentuated civil liberties problem, several commentators have suggested that the recent pronouncements of the Supreme Court of the United States preclude *any* prior restraint on motion pictures. As one writer, Ivan Brychta, declared:

> Under this language *(Burstyn)* . . . censorship . . . as a routine practice consisting in the obligation to submit all films . . . for previous approval is absolutely rejected by the Court.[26]

Upon careful analysis it would seem probable that such a sweeping statement is simply a case of the wish being father to the thought. It is to be supposed that such an analysis rests upon that part of the *Burstyn* opinion which cites *Near v. Minnesota.*[27] In that case the Court struck down a prior restraint on allegedly libelous newspaper material; the newspaper involved was conducting a political campaign against the city officials. The *Near* case only holds that prior restraint on political freedom of speech is void—and for the proposition that even such freedom is not absolute see *Dennis v. United States.*[28] The chief difficulty with the prior-restraint-subsequent-punishment dichotomy is that it is at once too broad and too narrow. While all cases on the subject have to date involved prior restraint there is no reason to suppose that this nascent impediment will not be equally applicable to censorship laws imposing only subsequent punishment.

The Brychta interpretation is too broad in that it ignores both express language in the *Burstyn* opinion and the Court's treatment of similar problems of free speech and assembly. While it may well be true that a prior restraint will be subject to a closer scrutiny than a subsequent punishment, it does not follow that a workable, definitive, prior restraint cannot be constitutionally effected.

A majority of the Court dropped a very broad hint in *Burstyn* that such a law would be upheld:

> To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however,

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[25] Since the Burstyn opinion there have been a few state decisions in which attempts were made to determine the exact limits of the Supreme Court's decision. The highest Court of Massachusetts was of the opinion that a law which permits city fathers to ban inappropriate movies on Sunday was unconstitutional. Brattle Films v. Commissioner of Public Safety, 127 N.E. 2d 891 (Mass., 1955). The Supreme Court of Ohio has held an application of the Ohio law to be unconstitutional. R.K.O. v. Department of Education, 162 Ohio St. 263 (1954). An Illinois court, however, upheld the validity of an application of the standard "obscene". American Civil Liberties Union v. Chicago, 3 Ill. (2d) 334, 121 N.E. 2d 585 (1954).

[26] Brychta, *supra* at 371.

[27] 283 U. S. 697 (1930).

[28] 341 U. S. 494 (1951).

is not the end of the problem. *It does not follow that the Constitution requires freedom to exhibit every motion picture of every kind at all times and places.* (Emphasis supplied).[29]

Nor does a perusal of the general area of freedom of speech indicate that no standards will suffice to validate a pre-exhibition censorship law. In *Cox v. New Hampshire*[30] a municipal ordinance banned unlicensed "parades or processions". The people convicted for failing to obtain such a license were 64 Jehovah's Witnesses who had marched single file down the sidewalks of town on an "information march." The Court held that a prior restraint was there valid since such parades would otherwise obstruct proper traffic control. Again in *Chaplinsky v. New York*[31] the Supreme Court upheld a restraint on freedom of speech. Although the case can be explained on the presence of a large restless crowd when the defendant was arrested for the language he used, some of the Court's language is especially interesting in the present context:

> These [punishable words] include the lewd and the obscene, the profane, the libelous and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to create an immediate breach of the peace.[32]

Other language in the same opinion indicated that there, as elsewhere, standards were of paramount importance:

> Appellant need not therefore have been a prophet to understand what the statute condemned.[33]

Where standards are non-existent or vague there is no question but that both prior restraint and subsequent punishment are constitutionally void. See *Kunz v. New York*[34] where a permit was necessary to hold worship services on the street and no standards were available; the Court struck down the offending statute. But an incitement to violence was constitutionally punishable in *Feiner v. New York*[35] under a very generally worded statute.

Another case which bears on the question of permissible exercise of state police powers and might be of more than passing interest here is *Kovacs v. Cooper*[36] wherein a local government was held not to have exceeded constitutional proscriptions in banning from the streets sound trucks emitting "loud and raucous" noises. The case apparently stands for the proposition that an assault on the public's eardrums may be suppressed even if such suppression impedes somewhat the usual right of free expression.

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[29] 343 U. S. at 502.
[30] 312 U. S. 570 (1941).
[31] 315 U. S. 568 (1942).
[32] *Id.* at 572.
[33] *Id.* at 574.
[34] 340 U. S. 290 (1951).
[35] *Id.* at 315.
[36] 336 U. S. 77 (1949).

In summary then, we may say that it is highly improbable that the Supreme Court of the United States has intended to strike down all prior restraint motion picture censorship. Although it has greatly restricted the field, it seems patent—from a consideration of both express dictam in the leading case and from other cases which permit speech restriction—that there are avenues of action still open to state and local governments. Since the law is in flux it is not immediately apparent just what form these restrictions might constitutionally take. This much we do know: Prior restraints utilizing such criteria as "immoral", "harmful", "sacrilegious", and "education" are and would be void. In addition, any words which carry political or religious overtones would undoubtedly be held unconstitutional.

As to standards which might be applied in the drafting of such legislation, we may note that the standards which have evoked the most favorable judicial response are (1) incitement to crime (2) obscenity. Regarding the former it has been well-stated that freedom of speech "does not protect a man from injunction against uttering words which have *all the effect of force.*" (emphasis supplied)[37] *In Winters v. United States*[38] it was suggested as dictum that the terms "obscene" or "lewd" would suffice. The term "obscene" does seem to have been rather extensively employed in federal legislation. 18 U. S. C. Section 1461 bans from the U. S. mails any "obscene, lewd, lascivious, or filthy" letters. That standard was upheld by the Court in *United States v. Rebuhn*[39]. If it be objected that even the criterion "obscene" is without definitional foundation consider the words of Learned Hand:

> . . . should not the word obscene be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?[40]

Augustus Hand indicated in *United States v. One Book Called Ulysses*[41] that the underlying factors determinative of whether or not a given book is obscene include: (1) relevancy of the objectionable material to theme (2) opinion of critics (3) the verdict of the past. The point of the foregoing is simply this: the term "obscene" has been thought to have a meaning capable of jural application.

Considered in conjunction with the *Kovacs* decision the foregoing cases take on additional significance. If a city may constitutionally protect the auditory systems of its citizenry why should not the same be true of its citizens' moral sensibilities? As one very learned gentleman, Professor Chafee, has put it:

The only sound explanation of the punishment of obscenity and

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[37] Holmes, J in Schenck v. United States, 249 U. S. 47, 52 (1919).

[38] 333 U. S. 507, 515-520 (1948).

[39] 109 F. 2d 512, *cert denied* 310 U. S. 629 (1940).

[40] United States v. Kennedy, 209 Fed. 119 (S.D.N.Y. 1913).

[41] 5 F. Supp. 182 (S.D.N.Y. 1933).

> profanity is that the words are criminal, not because of the ideas they communicate, but like acts, because of the immediate consequences to the five senses.[42]

As can be seen from the foregoing discussion, the Court in the area of moral and physical sensibilities has employed the doctrine of prior restraint less rigidly than in the areas of political and religious expression. The emphasis in determining the constitutionality of a restraint in the former field has been less upon the "when" and more upon the "how" and "why" elements. In the latter fields the Court has very nearly precluded the possibility of any *prior* restraint. A comparison of the *Near* and *Kovacs* opinions demonstrates the difference vividly. Nor is it surprising to discover such a dichotomy of approach—the freedom of religious and political action and speech have always been accorded special protection by the Court.

It is submitted that the Supreme Court has not intended to radically alter its position on censorship and free speech by the *Burstyn* line of cases. An attempt has been made rather to put movie censorship on a par with the regulation of other mass media (the constitutional limits of which are indicated by *Rebuhn, Kovacs and Cox).*

If it still be thought that any systematic pre-exhibition censorship of motion pictures is not constitutionally possible only two alternative conclusions appear: (1) *Kovacs, Cox, Rebuhn,* and *Kennedy* are overruled, 18 U. S. C. §1461 is unconstitutional, and the dicta in *Winters* and *Burstyn* are meaningless. (2) Motion pictures, regardless of subject matter, are to be accorded a preferred position over other mass media. Neither hypothesis is tenable. It is impossible to believe that the Supreme Court would reverse as settled a policy, indicated by *Rebuhn et al,* by a series of per curiam decisions in which those cases are nowhere adversely commented upon. The second hypotheses is unacceptable for the reason that no rational basis for such a distinction exists.

The most circumspect prediction that can be made is this: Although state and federal prior restraints on religious and political expression are void almost *per se,* a carefully delimited and judiciously administered prior restraint on motion picture morality would be upheld. Here the standard is the thing—both dicta in leading film censorship cases and other federal cases dealing with other aspects of speech restriction indicate that the criteria "incitement to crime" and "obscenity" are constitutionally sufficient to uphold a pre-exhibition exercise of governmental power.[43]

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[42] CHAFEE FREE SPEECH IN THE UNITED STATES, 150 (1941).

[43] It must be borne in mind, however, by those who would draft a constitutional motion picture censorship law that in addition to the foregoing considerations the requisites of *procedural* due process must be met. In this regard the various state administrative procedure acts have been, and should continue to be, employed to good effect. For Ohio law on the subject see OHIO REV CODE §3305.07 and OHIO REV. CODE §119.01 *et seq.*

THE SOCIAL UTILITY OF MOVIE CENSORSHIP

Leaving aside all legal arguments, it has been suggested by many censorship critics that the social worth of such laws is nil. Thomas Macaulay replying to the demands for the suppression of obscene books observed:

> We find it difficult to believe that in a world so full of temptations as this, any gentleman whose life would have been virtuous if he had not read Aristophanes and Juvenal will be made vicious by reading them.

And Judge Jerome Frank had this thought about suppressing obscenity:

> Perhaps further research will disclose that, for most men, such reading diverts from, rather than stimulates to, anti-social conduct.[44]

[44] Roth v. Goldman, 172 F 2d 788, 792 (1949).

The juvenile delinquency problem has been thought by at least one noted sociologist to have little connection with movies:

> In conclusion, while the relationship seems obvious, there is only limited evidence to indicate that newspapers, magazines, movies, the radio, comic books, and various agencies of moral risk produce delinquency.[45]

It is to be noted that the gentleman just quoted did not say that there was no such connection; nor did he mean to be understood to say that any particular movie might not have an adverse effect on adolescents who might view it. Although it has been stated often, and loudly, that there is no measurable relationship between delinquency and movie attendance, eminent sociologists disagree. In an actual sociological study made by persons who have no perceptible legal axe to grind it was stated:

> Cresseley and Thrasher also discovered in this area that among 1,356 boys 109 were delinquents. Of these 22 per cent attended the movies three times or more a week and six per cent attended less than once a week, while among those who were not delinquent 14 per cent attended three times or more a week and six per cent attended less than once a week. *These figures indicate that for this population there is a positive relationship between truancy and delinquency and movie attendance.* (emphasis supplied)[46]

Since a great percentage of today's movie-goers are 18 years and under, it would run counter to sound socio-psychological precepts to deny that motion pictures play a significant role in social behaviorism. For a striking example of such delinquency causation see the editorial page of the Cleveland Plain Dealer for September 29, 1954 reporting the case of a youth who was incited by a movie he had just seen to attack a girl with a paving brick.

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[45] 261 *Annals of American Academy of Political and Social Science* 42 (1949).

[46] W. W. CHARTERS, MOTION PICTURES AND YOUTH, 12-13 (1935).

Nor is the juvenile delinquency angle the only or even the most crucial consideration. At least as important as the criminal-causation factor is the effect which lewd or obscene movies may have upon the sensibilities of a large segment of the populace. It might be said that those individuals finding a given picture too lewd or lascivious for their tastes might exercise their constitutional perogative of freedom of movement and leave the theater. It might be said as well that citizens observing a pervert removing his clothes on the street corner may merely look the other way. They are not required to do so. As Professor Chafee so succinctly states:

> The law wants to prevent the sense of citizens from being offended by sights and sounds which would be seriously objectionable to a considerable majority and greatly interfere with their happiness. From this standpoint, the nasty word in a streetcar is treated like a lighted cigar. The law is interested in the immediate effect on the sensibilities of others.[47]

Since movie exhibition is at least a quasi-public enterprise, there is no manifest reason why a carefully circumscribed, judiciously administered pre-exhibition censorship cannot serve such a purpose.

Conclusions

A constitutional pre-exhibition motion picture censorship, requiring distributors to submit all pictures to a board for prior approval, could be drawn by a state legislature. Recent decisions of the Supreme Court do not require a contrary conclusion; the Court's overall approach to the problem of censorship indicates an avenue of constitutional state action. Care must be taken not to impinge upon either religious, anti-religious, or political expression. In all other areas the criterion is that of meaningful meticulously delineated standards. Ideally those standards should be those already judicially exonerated by the Court.

As previously indicated two such standards are: (1) obscenity (2) incitement to crime. These two terms, if employed, should be definitionally circumscribed so as to prevent a wider application than might be tolerated by the Court. While the two foregoing standards standing alone might be sustained, it is submitted that the burden of justification has shifted to the states so as to make desirable as careful a definition as possible. Here discretion is pragmatically the better part of valor.[48]

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[47] Chafee, Government and Mass Communication (Commission on Freedom and the Press) 196-197 (1947).

[48] I have included here a draft which it is believed will meet the social and constitutional mandates discussed. The draft, patterned after H. B. 241 introduced into the last session of the Ohio legislature, is not an attempt at definitive legislative drafting but is aimed only at demonstrating how the constitutional and policy matters might be accommodated by a state legislature. For convenience I have used Ohio code numbers.

> 3305.01—The department of education shall cause all motion picture films, or parts thereof, except as may be provided by Section 3305.02 of the Revised Code, to be promptly examined prior to the public exhibition or dis-

At least two other approaches to this problem have been suggested. Some experts have advocated the adoption of a post-exhibition punishment law with no provision for prior censorship. A subsequent punishment law alone would be both ineffective and unfair to theater owners. It would be ineffective since conviction in a jury trial case would be difficult if

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play of such motion picture films, or parts thereof, in this state. A license, in a form prescribed by the department of education, shall be issued to each motion picture film, or part thereof, examined by the department, unless it is found that such motion picture film, or part thereof, fails to comply with the provisions of 3305.03 of the Revised Code. No person, firm, or corporation shall publicly exhibit or display, motion picture films, or parts thereof, which have not been licensed pursuant to this section except as may be provided by Section 3305.02 of the Revised Code.

3305.02—All motion picture films, or parts thereof, may be publicly exhibited or displayed without a license from the department providing they are:

(A) Current events films, portraying news of the day and films commonly known as newsreels;

(B) Scientific or educational films, the primary purposes of which are for use by the professions or educational institutions;

(C) Motion picture trailers, all of the scenes of which are included in a previously licensed film;

(D) Intended solely for educational, charitable, or religious purposes.

3305.03—No motion picture film, or part thereof, shall be granted a license if it is found to be obscene or if it is found to tend to incite crime.

(A) For the purposes of this section a motion picture film, or part thereof, may be found to be obscene if:

(a) It portrays explicitly or in detail an act of sodomy, adultery, fornication, seduction, or rape or:

(b) The dominant purpose or effect of which is pornographic or portrays nudity offensive to common decency, sex organs, methods of abortion.

(B) For the purposes of this act, a motion picture film, or part thereof, may be found to tend to incite crime if:

(a) The dominant theme of the motion picture film or the manner of its presentation is of such character as to present the commission of crime or contempt for law as profitable, desirable or acceptable behavior, or:

(b) It teaches the use or methods of use of narcotics or habit forming drugs, or:

(c) It presents explicit methods for commission of crime.

The department of education shall grant a license to a motion picture film conditioned upon the elimination of part or parts of said film which conflict with the provisions of this section.

3305.04—Each motion picture film, or part thereof, submitted to the department of education pursuant to this act shall be accompanied with an application for license. The application shall be made on a form prescribed by the department of education. The application shall be accompanied with an application fee. The amount of said fee shall be determined by the department but in no event shall the department collect more from such applicants, in any given year, than is reasonably necessary to administer its licensing functions pursuant to this section. The department is hereby authorized to expend the funds so collected in pursuance of its duties under this section.

not impossible. The jury would feel, and quite rightly, that a theater owner should not be punished for failure to act effectively as a censor. Without a prior ruling, an owner could not be expected to correctly determine which movies are objectionable and which are not.

It has been suggested, alternatively, that prohibiting minors from viewing certain movies would be a desirable alternative. This should be rejected for two reasons. First, it places an unwarranted burden on theater owners to determine who is and who is not under age. Secondly, it would make the fact of censorship notorious to such minors and probably do as much harm as if they, in their sometimes innocent frames of mind, were allowed to see the films in the first instance. If explicit and detailed methodology of crime is banned, it is not probable that minors will be motivated to a life of crime simply because they have learned that such a thing exists.

It is also suggested that films used for special purposes like medical education and news dissemination be exempted from the operation of such a statute. The specialized nature of the former and the free press requirements of the latter clearly require such an exemption.

A pre-exhibition censorship alternatively prohibiting crime incitement and obscenity seems the best solution. Such a dichotomy would also effectuate the social mandates discussed. For although we venerate untrammelled freedom of expression, the arrest of juvenile delinquency and the protection of the public's moral sensibilities require at least a minimal consideration. A law such as here proposed would amalgamate a maximum of free expression with an essential minimum of social restraint. Thus may we avoid what Mr. Justice Frankfurter has termed "the tyranny of absolutes."

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